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Constitutional Litigation: Procedural Protections of Constitutional Guarantees in the Americas

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Constitutional Litigation: Procedural Protections of Constitutional Guarantees in the Americas

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The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect.

The constitution gives the courts the power to rule that a particular law is not valid if it violates the Charter of Rights and Freedoms ("Charter"), which is itself part of the constitution. The Charter provides courts with an important power to strike down laws that violate Charter rights. If only part of the law violates the Charter, only that part will be ruled invalid.

In Canada, the procedural protections of constitutional guarantees are available in criminal, civil, and administrative proceedings. Constitutional guarantees can be asserted in any proceeding before any court or any tribunal. They can be invoked as a sword or as a shield.

Canada's Charter of Rights and Freedoms, states that "anyone whose rights or freedoms, as guaranteed by [this] Charter, have been infringed or denied, may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[1] The remedy may also include an award in damages.

The Charter also provides that where "a court concludes that evidence was obtained in a manner that infringed . . . any right or freedoms guaranteed by the Charter, that evidence shall be excluded if it is established that, having regard to all the circum-

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1. Canadian Charter of Rights and Freedoms, Part I, § 24(1) of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

stances, the admission of it in the proceedings would bring the administration of justice into disrepute."[2]

The Charter protects those basic rights and freedoms of all Canadians that are considered essential to preserving Canada as a free and democratic country. It applies to all governments—federal, provincial and territorial—and includes protection of the following:

- Fundamental freedoms, democratic rights[3]
- The right to live and seek employment anywhere in Canada[4]
- Legal right: the right to life, liberty and personal security[5]
- Equality rights for all[6]
- The official languages of Canada[7]
- Minority language education rights[8]
- Canada's multicultural heritage[9] and
- Aboriginal peoples' rights.[10]

The rights and freedoms in the Charter are not absolute. Section 1 of the Charter says that Charter rights can be limited by other laws, so long as those limits can be shown to be reasonable in a free and democratic society.[11]

The Supreme Court of Canada has stated that a limit on Charter rights is acceptable if the limit deals with a pressing and sub-

2. *Id.* at § 24(2).
3. *Id.* at §§ 1-5.
4. *Id.* at § 6.
5. *Id.* at § 7.
6. Canadian Charter of Rights and Freedoms, Part I, § 15 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).
7. *Id.* at §§ 16-22.
8. *Id.* at § 23.
9. *Id.* at § 27.
10. Canadian Charter of Rights and Freedoms, Part II, § 35 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.). *See also*, *Id.* at § 29, also pertaining to Aboriginal peoples' rights.
11. Canadian Charter of Rights and Freedoms, Part I, § 1 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 1 (U.K.).

stantial social problem and the government's response to the problem is reasonable and demonstrably justified.[12]

The Charter sets out several important rules that protect anyone charged with an offence under federal law or provincial law.[13]

Persons accused of a crime must be told promptly with what offence they are charged; their trials must take place within a reasonable time; and they cannot be forced to testify at their own trials.[14]

Anyone accused of breaking the law is presumed to be innocent until proven guilty.[15] This means that the prosecution must prove beyond a reasonable doubt that the person committed the offence, before he or she can be found guilty. The trial must also be conducted fairly before a court, which is unbiased and independent of political or any other influence.[16] A fair trial ensures that the rights of the accused are properly protected.

An accused person is also entitled to reasonable bail and, for very serious charges, has the right to trial by jury.[17]

A court cannot convict a person of a crime unless the law in force at the time of the offence specifically stated that the actions in question were illegal.[18]

If a person is tried for an offence and found not guilty, he or she cannot be tried on the same charge again.[19] Moreover, if the person is found guilty and punished for the offence, he or she cannot be tried or punished for it again.[20]

In a situation where a person commits an offence and before he or she is sentenced, a new law alters the fine or term of imprisonment that applies, that person must be sentenced under whichever law is the more lenient.[21]

The Charter makes it clear that every individual in Canada—regardless of race, religion, national or ethnic origin, colour, sex,

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12. R. v. Oakes, [1986] 1 S.C.R. 103 (Can.). *See generally*, EUGENE MEEHAN, ET AL., THE 2000 ANNOTATED CANADIAN CHARTER OF RIGHTS AND FREEDOMS (2000).

13. MINISTER OF PUBLIC WORKS AND GOVERNMENT SERVICES CANADA, YOUR GUIDE TO THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, SPECIAL EDITION (2003), *available at* http://www.pch.gc.ca/pgm/pdp-hrp/canada/guide/index-eng.cfm.

14. *Id.* at §§ 10-11.

15. *Id.* at § 11(d).

16. *Id.*

17. *Id.* at § 11(e)-(f).

18. Canadian Charter of Rights and Freedoms, Part I, § 11(g) of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 1 (U.K.).

19. *Id.* at § 11(h).

20. *Id.*

21. *Id.* at § 11(i).

age, or physical or mental disability—is to be considered equal.[22] This means that the government must not discriminate on any of the listed grounds in its laws or programs.[23]

Because Canada is a federal state, the courts are also empowered to determine the division of legislative powers and, where appropriate, to declare a legislative provision to be *ultra vires* by reason of the division of legislative powers in the Constitution.

The rules of civil procedure in Canadian courts favour the least the least costly and most expeditious hearing of a matter.

Special proceedings have been developed in Canada to deal with specific rights, such as a judicial procedure to preserve the confidentiality of a taxpayer's document in the hands of his/her lawyer, to provide members of the press with notice and an opportunity to be heard when a party to a judicial proceeding requests that the press be excluded, and to deal with unacceptable delays to the right of an accused to trial.[24]

The procedural protections of constitutional guarantees can only be effective if accompanied by an independent judiciary, an independent bar, and a free press. It is also essential that these procedures provide for an effective and binding remedy.

Let me illustrate by reference to real examples of procedures invoked by Canadian courts that allow persons to assert their rights and the forms of procedures and remedies available to them.

My first example relates to publication bans. Our Supreme Court has stated in a 2001 decision the following:

> A publication ban should only be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice, because reasonable alternative measures will not prevent the risk, and when the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice. The party bringing the application has the burden of displacing the presumption of openness. That party must also establish a sufficient evidentiary basis to allow the judge

22. *Id.* at § 15.

23. Canadian Charter of Rights and Freedoms, Part I, § 15 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 1 (U.K.).

24. See *infra* notes 42-43.

to make an informed application of the test, and to allow for review.[25]

As the Court explained in CBC v. New Brunswick:[26]

> The open court principle is one of the hallmarks of a democratic society, fostering public confidence in the integrity of the court system and understanding of the administration of justice. This principle is inextricably tied to the rights guaranteed by s. 2(*b*) of the *Charter*. The freedom to express ideas and opinions about the operation of the courts and the right of members of the public to obtain information about them are clearly within the ambit of s. 2(*b*). As well, s. 2(*b*) protects the freedom of the press to gather and disseminate this information. Members of the public in general rely and depend on the media to inform them and, as a vehicle through which information pertaining to courts is transmitted, the press must be guaranteed access to the courts in order to gather information. Measures that prevent the media from gathering that information and from disseminating it to the public, restrict the freedom of the press guaranteed by s. 2(*b*). To the extent that such measures prohibit public access to the courts and to information about the courts, they may also be said to restrict freedom of expression . . . .[27]

In an earlier decision, Edmonton Journal v. ALTA[28], the Court framed it in this manner:

> Freedom of expression is of fundamental importance to a democratic society and should only be restricted in the clearest of circumstances. It is also essential to a democracy, and crucial to the rule of law, that the courts are seen to function openly. The press must thus be free to comment and report upon court proceedings to ensure that the courts are in fact seen by all to operate openly in the penetrating light of public scrutiny. It is only through the press that most individuals can really learn of what is occurring in the courts. The members of the public, as 'listeners' or 'readers,' have a right to re-

25. R. v. Mentuck, [2001] 3 S.C.R. 442 (Can.).
26. (A.G.), [1996] 3 S.C.R. 480 (Can.).
27. *Id.*
28. (A.G.), [1989] 2 S.C.R. 1326 (Can.).

ceive information pertaining to public institutions, in particular the courts.[29]

The Supreme Court developed what is commonly known as the Dagenais/Mentuck test and affirmed that it should be applied to all discretionary judicial decisions that limit freedom of expression by the press.[30] In *Dagenais v. CBC*[31] the Chief Justice suggested the following general guidelines. He stated:

> In order to provide guidance for future cases, I suggest the following general guidelines for practice with respect to the application of the common law rule for publication bans: (a) At the motion for the ban, the judge should give the media standing (if sought) according to the rules of criminal procedure and the established common law principles with regard to standing. (b) The judge should, where possible, review the publication at issue. (c)The party seeking to justify the limitation of a right (in the case of a publication ban, the party seeking to limit freedom of expression) bears the burden of justifying the limitation. The party claiming the common law rule that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial is seeking to use the power of the state to achieve this objective. A party who uses the power of the state against others must bear the burden of proving that the use of state power is justified in a free and democratic society. Therefore, the party seeking the ban bears the burden of proving that the proposed ban is necessary, in that it relates to an important objective that cannot be achieved by a reasonably available and effective alternative measure, that the proposed ban is as limited (in scope, time, content, etc.) as possible, and there is a proportionality between the salutary and deleterious effects of the ban. At the same time, the fact that the party seeking the ban may be attempting to safeguard a constitutional right must be borne in mind when determining whether the proportionality test has been satisfied. (d) The judge must consider all other options besides the ban and must find that there is no reasonable and effective alternative available. (e) The judge must consider all possible ways to limit the ban and must find that there is no reasonable and

29. *Id.*
30. Dagenais v. CBC, [1994] 3 S.C. R. 835, 891(Can.).
31. [1994] 3 S.C. R. 835, 891(Can.).

> effective alternative available. (f) The judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate.[32]

The guiding rule is that a "judge must accommodate the open court principle to as great an extent possible without risking a breach of the informer privilege."[33]

The next illustration of court-sponsored procedures in Canada to ensure the respect of guaranteed rights is the legal structure for consultation with First Nations concerning the impact of government action on aboriginal rights.

Section 35 of the Constitution Act of 1982 states that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada" (which include Indian, Inuit and Métis peoples) are "recognized and affirmed."[34] It is the main provision dealing with aboriginal and treaty rights. These rights cannot be limited by Section 1 of the Charter.

The leading case on the duty of the Crown to consult with and accommodate aboriginal groups with claims to land and aboriginal rights prior to taking action that may adversely affect those interests is Haida Nation v. British Columbia.[35]

In *Haida Nation*, the Court stated:

> The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the principle of the honour of the Crown, which must be understood generously. While the asserted but unproven Aboriginal rights and title are insufficiently specific for the honour of the Crown to mandate that the Crown act as a fiduciary. At the same time, the Crown, acting honourably, cannot cavalierly run roughshod over aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. The foundation of the duty in the Crown's honour and the goal of reconciliation suggest that the duty arises when the Crown has

32. *Id.*

33. Named Person v. Vancouver SUN, [2007] 3 S.C.R. 253, para. 55 (Can.).

34. Canadian Charter of Rights and Freedoms, Part II, § 35 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 1 (U.K.).

35. [2004] 3 S.C.R. 511 (Can.).

> knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. Consultation and accommodation before final claims resolution preserve the Aboriginal interest and are an essential corollary to the honourable process of reconciliation that Section 35 of the Constitution Act of 1982 demands.
>
> The scope of the duty is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed. The Crown is not under a duty to reach an agreement; rather, the commitment is to a meaningful process of consultation in good faith. The content of the duty varies with the circumstances, and each case must be approached individually and flexibly. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal people with respect to the interests at stake. The effect of good faith consultation may be to reveal a duty to accommodate. Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other interests.[36]

The Court in *Haida Nation* went on to assert that, "[t]hird parties cannot be held liable for failing to discharge the Crown's duty to consult and accommodate. The honour of the Crown cannot be delegated, and the legal responsibility for consultation and accommodation rests with the Crown. This does not mean, however, that third parties can never be liable to Aboriginal peoples."[37]

Another area with which I wish to deal is that of constitutional remedies and, in particular, the various methods that Canadian Courts have utilized in order to tailor the relief to the exigencies of the situation.

As indicated earlier, if the courts determines that a Charter right or freedom has been violated and that it is not a reasonable limit under Section 1 of the Charter, then the court can grant

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36. *Id.*
37. *Id.*

whatever remedy it feels is appropriate under the circumstances. The court may also make an order that the law in question is of no force or effect.

In a criminal case, a court may stay or delay the trial of a person whose rights have been denied. Special remedies are also available if the government obtains evidence through unreasonable search or seizure.

In R. v. Askov,[38] the Supreme Court of Canada enumerated the factors, which should be taken into account in considering whether the length of the delay of a criminal trial has been unreasonable and, therefore, a breach of the accused's right to be tried within a reasonable time.[39] They are:

1. The length of the delay;

2. The explanation for the delay attributable to the prosecution of the accused and any delays occasioned by systemic or institutional delays such as inadequate resources;

3. Any waiver of rights by the accused; and;

4. Any prejudice to the accused.[40]

The Canadian Supreme Court has devised unique remedies to deal with concerns, such as the proper institutional division of labour between courts and legislatures. The courts are allowed by Section 24(1) of the Charter to devise remedies that they consider "appropriate and just in the circumstances."[41] This gives the courts wide discretion, but remedies must still be responsive and effective within the unique circumstances of each case.

In Mills v. The Queen,[42] Justice McIntyre wrote:

> What remedies are available when an application under s. 24(1) of the *Charter* succeeds? Section 24(1) again is silent on the question. It merely provides that the appellant may obtain such remedy as the court considers "appropriate and just in the circumstances." It is difficult to imagine language which could give the court a wider and less fettered discre-

38. [1990] 2 S.C.R. 1199 (Can.).
39. *Id.*
40. *Id.*
41. Canadian Charter of Rights and Freedoms, Part I, § 24(1) of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 1 (U.K.).
42. [1986] 1 S.C.R. 863, 965 (Can.).

> tion. It is impossible to reduce this wide discretion to some sort of binding formula for general application in all cases, and it is not for appellate courts to pre-empt or cut down this wide discretion.[43]

In Doucet-Boudreau v. Nova Scotia (Minister of Education),[44] Judges Iacobucci and Arbour, writing for the majority, wrote:

> Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for *Charter* violations" since "a right, no matter how expansive in theory, is only as meaningful as a the remedy provided for its breach" [*R. v. 974649 Ontario Inc.* 2001 SCC 81, paras. 19-20]. A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.[45]

Furthermore, in *Doucet-Boudreau*, the majority indicated that the following principles should guide the Court in fashioning Charter remedies: (1) The remedy should meaningfully vindicate the rights and freedoms of the claimants; (2) The remedy must employ legitimate means within the framework of our constitutional democracy; (3) The remedy must be "a judicial one, which vindicates the right while invoking the functions and powers of a court"; (4) The remedy must, after ensuring that the claimants' rights are fully vindicated, be "fair to the party against whom the order is made"; and (5) "[T]he judicial approach to [Charter] remedies must remain flexible and responsive to the needs of a given case.[46]

The following types of remedies have been granted:

a. Striking legislation:

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43. *Id.*
44. (Minister of Education), [2003] 3 S.C.R. 3 (Can.).
45. *Id.*
46. *Id.* at para. 55-59.

The court makes a determination that the legislation is of no force or effect.

b. Reading down:

Courts may read down an unconstitutional law by giving it a constitutionally-compliant interpretation. For example, in R. v. Grant,[47] the SCC read down a provision of the *Narcotics Control Act*,[48] so that it was compliant with the Charter right to be secure against unreasonable search or seizure.[49] One of the reasons this remedy may be chosen is to "preserv[e] the objectives of Parliament in so far as it is possible within constitutional parameters."[50]

c. Reading in:

If a law is under-inclusive, such that it does not cover all of those that should be afforded the constitutional right, the court may interpret it more broadly. For example, in Vriend v. Alberta,[51] the Supreme Court found that Alberta human rights legislation violated the equality rights guaranteed by Section 15 of the Charter, since it did not include homosexuality as a prohibited ground of discrimination.[52] The Supreme Court has stated that "the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature."[53]

d. Suspending invalidity:

If a statute or a portion thereof is struck down as unconstitutional, the invalidity may be temporarily suspended in order to allow the legislative branch to respond. For example, in Re Manitoba Language Rights,[54] the Supreme Court held that Manitoba's unilingual legislation violated the language rights protected in the Charter. [55] However, the Court recognized that immediate invalidation of Manitoba's unilingual legislation would result in an absence of the rule of law (which is an unwritten constitutional prin-

47. [1993] 3 S.C.R 223 (Can.).
48. Narcotics Control Act, R.S.C. 1985, c.N-1, s. 10; repealed 1996, c.19, s. 94
49. *R. v. Grant*, [1993] 3 S.C.R 223 (Can.).
50. *Id.* at 245.
51. [1998] 1 S.C.R. 493, para. 88 (Can.).
52. *Id.*
53. Schachter v. Canada, [1992] 2 S.C.R. 679, 700 (Can.).
54. [1985] 1. S.C.R. 721 (Can.).
55. *Id.*

ciple) and, thus, allowed a suspension of invalidity until bilingual legislation was enacted.[56]

e. Retaining jurisdiction of the list in some cases:

In Doucet-Boudreau v. Nova Scotia (Minister of Education),[57] the Supreme Court examined whether it was appropriate for a trial judge, after finding that Section 23 of the Charter (dealing with minority language educational rights) required the Nova Scotian government to use its best efforts to build French-language school facilities by given dates and to retain jurisdiction to hear reports on the progress of those efforts.[58] The majority of the Supreme Court held that the trial judge's remedy was appropriate, given the historical and contextual factors.[59] The Supreme Court also noted "the government's failure to give due priority to s. 23 rights in educational policy setting."[60]

It is also important to consider, if only briefly, the role of judicial review in administrative law:

Even where a constitutional issue is not involved, the courts have a varying degree of jurisdiction to review the interaction between the individual and the state.

The Supreme Court of Canada has noted the increasingly important role that administrative tribunals play in the daily lives of Canadians.[61] As Chief Justice Richard stated in his paper, "[j]udicial review is the principal, and often the only, avenue available to individuals seeking recourse against state action."[62]

In Dunsmuir v. New Brunswick,[63] Justices Bastarache and LeBel noted that "[j]udicial review is intimately connected with the preservation of the rule of law."[64] In the *Quebec Secession Reference,* the Court affirmed that "[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their

56. *Id.* at para. 54.
57. [2003] 3 S.C.R. 3 (Can.).
58. *Id.*
59. *Id.*
60. *Id.* at para. 39.
61. Tel. Co. v. Newfoundland (Bd. of Comm'rs of Pub. Util.), [1992] 1 S.C.R. 623, 634 (Can.).
62. C.J. John D. Richard, *Judicial Review in Canada*, 45 DUQ. L. REV. 483, 484 (2007).
63. [2008] 1S.C.R. 190, para. 27 (Can.).
64. *Id.*

affairs. It provides a shield for individual from arbitrary state action."[65]

The case, *Charkaoui v. Canada (Minister of Citizenship and Immigration)*[66] dealt with issues of national security:

The individuals in this case alleged that they could be deported to torture, in violation of their Section 7 right to a fair judicial process.[67] Chief Justice McLachlin indicated the importance that both the "administrative constraints associated with the context of national security" and serious individual interests at stake are considered in determining whether a particular process violates Section 7.[68] She states:

> The procedures required to conform to the principles of fundamental justice must reflect the exigencies of the security context. Yet they cannot be permitted to erode the essence of s. 7. The principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the *Charter*. The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7, meaningful and substantial protection there must be.[69]

While noting that the right to know the case to meet is not absolute,[70] Chief Justice McLaughlin found that the security certificate scheme violated Section 7 of the Charter because "[t]he judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring."[71] More specifically, she stated:

> In the context of national security, non-disclosure, which may be extensive, coupled with the grave intrusions on liberty imposed on a detainee, makes it difficult, if not impossible, to find substitute procedures that will satisfy s. 7. Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an oppor-

65. (1998) 2 S.C.R. 217, para. 70 (Can.).
66. [2007] 1S.C.R 350 (Can.).
67. *Id.* at at para 11.
68. *Id.* at para. 23.
69. *Id.* at para. 27.
70. *Id.* at para.58.
71. Charkaoui v. Canada (Minister of Citizenship & Immigration), [2007] 1 S.C.R. 350, para. 64 (Can.).

> tunity to meet the case. Yet the imperative of the protection of society may preclude this. Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world. If s. 7 is to be satisfied, either the person must be given the necessary information, or a substantial substitute for that information must be found. Neither is the case here.[72]

Chief Justice McLachlin concluded that, while it is for Parliament to decide what must be done to protect the individual and to keep critical information confidential, the government can do more than what is currently done under Immigration and Refugee Protection Act ("IRPA").[73] She noted the existence of the special advocate system employed in the United Kingdom.[74]

As a consequence of this decision, Parliament enacted the special advocate system regime as Sections 85 through 85.6 of IRPA by "[a]n Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act."[75]

For rights to be meaningful and effective they must be accompanied by procedures to enforce them which are easily accessible and which produce an effective and binding result.

In a decision released on July 23, 2010, the Supreme Court of Canada held that damages may be an appropriate and just remedy for a breach of Charter rights.[76] It noted that the Charter guarantees the fundamental rights and freedoms of all Canadians and provides remedies for their breach.[77] The first and most important remedy is the nullification of laws that violate the Charter under Section 52(1) of the Constitution Act of 1982.[78] This is supplemented by Section 24(2), under which evidence obtained in breach of the Charter may be excluded if its admission would

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72. *Id.* at para. 61.

73. *Id.* at para. 87.

74. *Id.* at para. 80, 84.

75. An Act to amend the Immigration and Refugee Protection Act (certificate and special advocate) and to make a consequential amendment to another Act, S.C. 2008, c.3.

76. City of Vancouver v. Ward, [2010] S.C.R. 28 (Can.).

77. *Id.*

78. Canadian Charter of Rights and Freedoms, Part VII, § 52(1) of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 1 (U.K.).

bring the administration of justice into disrepute,[79] and Section 24(1), under which the Court is authorized to grant such remedies to individuals for infringement of Charter rights as it "considers appropriate and just in the circumstances."[80]

The Court held that damages may be awarded for Charter breach under Section 24(1).[81] The courts are to follow a four-step procedure:

1. Establish that a Charter right has been breached.

2. "Show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches."

3. "The state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damages award and render damages inappropriate or unjust."

4. Assess the quantum of the damages.[82]

The Court stressed that "these are not private law damages, but the distinct remedy of constitutional damages."[83] As a result, the action lies against the state and not against individual actors.[84]

79. Canadian Charter of Rights and Freedoms, Part I, § 24(2) of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 1 (U.K.).
80. *Id.* at para. 1.
81. *Id.* at para. 4.
82. *Id.*
83. *Id.*
84. City of Vancouver v. Ward, [2010] S.C.R. 28 (Can.).